# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>August 7, 2007 |
| v | No. 267441<br>Livingston Circuit Court |
| JOHN RICHARD TYLER,<br><br>Defendant-Appellant. | LC No. 05-014894-FC |

Before: Murphy, P.J., and Zahra and Servitto, JJ.

PER CURIAM.

Defendant appeals his convictions of three counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a) (victim under 13 years of age). The trial court sentenced defendant to concurrent terms of 71 months to 15 years in prison for each count, and we affirm.

## I. Assistance of Counsel

Defendant argues that his attorney was ineffective for various reasons. Because defendant failed to request an evidentiary hearing and did not move for a new trial, "our review is limited to mistakes apparent on the record." *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).[1]

[1] The right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. Where the issue is counsel's performance, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under professional norms, and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 309, 312-313; 521 NW2d 797 (1994).

Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases. *Pickens*, *supra* at 325. There is therefore a strong presumption of effective counsel regarding issues of trial strategy. *People v Mitchell*, 454 Mich 145, 155; 560 NW2d 600 (1997). An appellate court will not second-guess matters of strategy or use the benefit of hindsight when assessing counsel's competence. *People*

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Defendant says his counsel was ineffective because he failed to (1) provide expert testimony about the LACOSA interview process, (2) have an expert testify that defendant did not fit the profile of a sex offender, and (3) hire a medical expert. This claim is not properly before this Court absent a *Ginther*[2] hearing, *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000), and defendant failed to appropriately request from this Court a *Ginther* hearing. See MCR 7.211(C)(1)(ii). Moreover, defendant has not presented sufficient reasons to grant such a request.

This case does not involve *suspected* abuse that was brought out during a later forensic interview. Rather, the victim spontaneously told her parents about the abuse and her story did not materially change with the forensic interview.[3] Thus, alleged problems with the interview process would not be a material issue to explore at trial. Further, the failure to hire a medical expert had no significance because the charged conduct would not have left any marks on the victim and because the assaults occurred several years before the victim reported them. And finally, defense counsel's failure to have an expert testify that defendant did not fit the profile of a sex offender is irrelevant because this Court has held that such evidence is inadmissible, *People v Dobek*, 274 Mich App 58; 732 NW2d 546 (2007), and counsel is not required to assert a meritless position. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995).

We observe, however, that defense counsel should have objected to some instances of prosecutorial misconduct, as discussed later in this opinion. However, had defense counsel objected, the record reveals that the ultimate outcome would not have been different. Indeed, there is no reasonable possibility that timely objections to the prosecutor's comments would have altered the outcome of the trial and the final result was not fundamentally unfair or unreliable. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Accordingly, defendant is not entitled to a new trial on this basis.

Clearly, the prosecutor's reference to the child molester and serial killer John Wayne Gacy was inappropriate. See *People v Kelley*, 142 Mich App 671; 370 NW2d 321 (1985). However, an objection by defense counsel would not have resulted in a different outcome and defendant's conviction was both fair and reliable.[4] The prosecutor's reference also differs from the facts of *Kelley* because, here, the comment was not made in response to defendant's character

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*v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[3] One disparity was the victim's recollection of a cunnilingus incident, which was ultimately dropped from the case.

[4] Ultimately, this case focused on whether the jury believed the victim's allegations. We find it difficult to believe that any jury would find the victim more believable simply because the prosecutor brought up the name of an infamous serial killer in closing argument. We conclude that there is not a reasonable probability that the outcome of this case would have been different absent the comment or with an appropriate objection by defense counsel.

witnesses, Gacy's molestation and murder of numerous young boys is not comparable to defendant's alleged sexual touching of his granddaughter, and the Gacy case is remote in time.[5]

II. Prosecutorial Misconduct

Defendant claims that he is entitled to a new trial because the prosecutor asked defendant to comment on the credibility of the complaining witness, accused defense counsel of using red herring arguments, compared the defense to rotting fish, improperly defined the reasonable doubt standard, discussed the courage of the victim to appeal to the jury's sympathies, and compared defendant to John Wayne Gacy in rebuttal to defendant's closing argument.

Defendant did not object to any of the alleged conduct, and his claims are not preserved. "[A] defendant's unpreserved claims of prosecutorial misconduct are reviewed for plain error." *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003). *Id.* Reversal is not required "where a curative instruction could have alleviated any prejudicial effect." *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003).

Defendant claims that the prosecutor improperly appealed to the jury's emotions and sympathies by emphasizing the victim's ordeal and highlighting the courage she displayed. The prosecutor merely asked the jury to consider the circumstances of the victim's testimony as indicative of a lack of a substantial motive for the victim to lie. This is not improper. *People v Thomas*, 260 Mich App 450; 678 NW2d 631 (2004).

Defendant also complains that the prosecutor accused defense counsel of dragging "a bunch of rotting, stinking fish" past the jury to attempt to confuse the issues. But the prosecutor stated this in the context of explaining where the phrase "red herring" originated to illustrate her point that the jury should focus on the important issues and not be derailed by minor inconsistencies in testimony. A prosecutor need not argue a case in the blandest possible terms. *People v Matuszak*, 263 Mich App 42, 55-56; 687 NW2d 342 (2004). And, in context, colorful though the language was, it was not likely to have altered the jury's evaluation of the central issue in the case, the complainant's credibility.

Defendant further maintains that the prosecutor should not have asked defendant whether the victim was lying. Irrespective of whether the question was proper, any alleged error was clearly harmless because there is no prejudice to the defendant and a timely objection could have cured any alleged prejudice. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985).

[5] We also hold that defendant is not entitled to a new trial based on new evidence, for the reasons set forth above about the evidence to be discovered in a *Ginther* hearing and, further, because this is not the appropriate forum to request a new trial based on new evidence. See MCR 7.211(C)(1)(ii); MCR 6.431(A).

Defendant takes issue with the prosecutor's closing argument in which he told the jury not to "go fishing for the doubt. If doubt exists you will know it. You don't have to go and search and say maybe this, maybe that, maybe this. The reality is if there is reasonable doubt you'll find it." This is not the correct standard for reasonable doubt because it incorrectly suggests that reasonable doubt would necessarily be readily apparent. However, reversal is not required because the trial court gave the correct standard in the jury instructions:

> A reasonable doubt is a fair honest doubt growing out of the evidence or lack of evidence. It is not merely an imaginary or a possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that. A doubt that is reasonable after a careful and considerate examination of the facts and circumstances of this case.

Finally, as discussed above, defendant claims the prosecutor committed misconduct when she brought up John Wayne Gacy. While arguably improper, defendant is not entitled to relief on this issue because we cannot conclude that the comment resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.

## III. Sentence

Defendant contends that the trial court improperly scored 15 points for offense variable (OV) 8. OV 8 is properly scored at 15 points if the "victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL 777.38(1)(a). According to defendant, the score was improper because, though he allegedly took the victim to a "secret room" in his basement to sexually molest her, it was incidental to the offense and did not subject the victim to any greater danger. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

The victim testified that defendant took her to his "secret room" in the basement to molest her. Clearly, an out of the way room that is hard to access and out of sight would facilitate a perpetrator's molestation more than a more conspicuous location. Therefore, the trial court correctly ruled that defendant's conduct of taking the victim to the "secret room" put her in greater danger of molestation and the trial court correctly scored 15 points for OV 8. See *People v Cox*, 268 Mich App 440, 454-455; 709 NW2d 152 (2005) (holding there was evidence to support scoring 15 points for OV 8 where the defendant transported the victim to the defendant's house and "in light of the sexual acts that subsequently occurred there, the transportation of the victim was to a place of greater danger").

Defendant claims that he was improperly scored 10 points for OV 19 for telling the victim that she could not tell anyone what he did to her or he would get into trouble. According to defendant, the assertion was simply a true statement and did not involve any threats. The statute provides that 10 points should be scored where "[t]he offender otherwise interfered with

or attempted to interfere with the administration of justice." MCL 777.49(c). Defendant's admonition to the victim not to tell anyone what he did to her amounted to an affirmative act to prevent investigation of his crimes. See *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004). Accordingly, the trial court correctly scored OV 19 at 10 points.[6]

Affirmed.

/s/ William B. Murphy
/s/ Brian K. Zahra

[6] Finally, defendant claims that the trial court improperly engaged in judicial fact-finding when it scored the sentencing guidelines variables. Specifically, defendant contends that our Supreme Court's opinion in *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006), was wrongly decided. *Drohan* is binding precedent and defendant is not entitled to relief on this basis. See, e.g., *People v Tierney*, 266 Mich App 687, 713; 703 NW2d 204 (2005).